Filed 2/19/19 P. v. Vasquez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PEDRO VASQUEZ, Defendant and Appellant.	2d Crim. No. B287908 (Super. Ct. No. BA445527) (Los Angeles County)

Pedro Vasquez appeals from judgment after a jury convicted him of two counts of second degree murder for the killing of two brothers, Juan and Antonio Aguilar. The jury found that Vasquez personally discharged a firearm during each offense. (Pen. Code, § 12022.53, subds. (d).)[1] The trial court sentenced Vasquez to a total term of 80 years to life, comprised of two consecutive terms of 15 years to life for the murders and 25 years to life for each of the firearm enhancements.

[1] The jury found true a multiple-murder special circumstance allegation. The trial court struck it as invalid because Vasquez was not convicted of first degree murder.

We reject Vasquez's contention that there was sufficient evidence of provocation to require the trial court to instruct the jury on voluntary manslaughter sua sponte. We agree the trial court should have an opportunity to exercise its discretion to strike the firearm enhancements in the interest of justice under the 2018 amendment to section 12022.53, subdivision (h). The amendment became effective days before Vasquez was sentenced and the trial court appears not to have been aware of it. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At about 11:00 on a Sunday morning, Juan Aguilar and Antonio Aguilar sat together on a park bench in Los Angeles. Two cars pulled into the parking lot. Vasquez got out of one of the cars. He was accompanied by his mother, his sister, and another young man. Vasquez led his group, single file, toward the Aguilars. He shot and killed the brothers. He and his companions returned to the parking lot and drove away.

The brothers were unarmed. An eyewitness testified there was no yelling or argument before the shooting. The incident took about two minutes. Vasquez and the brothers had known each other since they were children.

The park visitors who witnessed the killing did not identify Vasquez, but his identity as the shooter is not an issue in this appeal. His identity was established by general descriptions, surveillance footage, cell tower records, vehicle information, and incriminating statements he made afterward, among other things.

Six days before Vasquez shot Juan and Antonio, Juan sent a threatening text message to Vasquez. It read: "Check it foo I'm going to only tell you this shit once. The next straight up on my kids homie next fuckin' time your jefa [mother] let's my kids come

out her mouth or my name period there's going to be pedo. So do you and your jefa the parro and let her know that shit better stop and if she wants to test it by all means do so. So I got at the homies, and they let me know that they are on it. They would be doing the same when it comes to the family talk. About me, that's one thing, but you mention my kids and try to embarrass them, good luck. So I'm letting you know cause I ain't never no lil hyna and just start doing shit without them knowing, so if you're my homie, like you say you are, then you'll check that for me. If not, then I know how it is."

As translated by a sheriff's detective at trial, the text message warned Vasquez that, if he did not stop his mother from saying negative things about Juan's children, there would be trouble. The message said that Juan's "homies" had given him permission to "do something about it."

After the shooting, Vasquez told a former girlfriend, "I fucked up. I gotta leave town." She had heard about the shooting, and asked why he did it. He said, "I didn't want to get jumped." She asked why he did not "take a different route." He answered, "[I] didn't want to look like a bitch."

The People charged Vasquez with first degree murder of both brothers. His defense was mistaken identity.

Vasquez did not request instructions on any offense less than first degree murder. The trial court said it would instruct on first and second degree murder. Vasquez objected to the second degree instruction; he wanted the jury to be given an all or nothing choice. The trial court overruled his objection. It found the evidence supported an instruction on second degree because something may have been said at the park that provoked Vasquez. It did not instruct on manslaughter and neither side asked it to do so.

The jury acquitted Vasquez of first degree murder and convicted him of second.

DISCUSSION

Voluntary Manslaughter Instruction

"[A] defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal. 3d 524, 533.)

Vasquez contends he was entitled to a sua sponte voluntary manslaughter instruction, although he objected to a second degree instruction. He relies on evidence that Juan sent a threatening text message six days before the shooting and evidence that he said after the killing: "I didn't want to get jumped." The People contend he invited any error.

We consider Vasquez's claim, but conclude the evidence does not support an instruction on voluntary manslaughter. Vasquez had six days to cool off after receiving Juan's message and there is no evidence of any other provocative conduct by either victim.

We independently review failure to instruct on a lesser-included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.) The trial court must instruct on any lesser-included offense that is supported by substantial evidence, even if the defendant objects, and whether or not the instruction is consistent with his theory or testimony. (*People v. Barton* (1995) 12 Cal.4th 186, 196; *People v. Elize* (1999) 71 Cal.App.4th 605, 612, 615.)[2] We

---

[2] The sua sponte duty to instruct on lesser-included offenses differs from the duty to instruct on defenses. The court has a sua sponte duty to instruct on only those defenses that are supported by substantial evidence and not inconsistent with the

thus reject the People's contention that Vasquez invited the claimed error.

The trial court did not err because there is no substantial evidence to support an instruction on voluntary manslaughter. Voluntary manslaughter is a lesser included offense to premeditated murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) It is an intentional, unlawful killing without malice aforethought. (*People v. Rios* (2000) 23 Cal.4th 450, 458.) It occurs "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) Vasquez's response to a text message six days later was not "sudden." (§ 192; *People v. Daniels* (1991) 52 Cal.3d 815, 868; *People v. Pride* (1992) 3 Cal.4th 195, 220.)

It is true that provocation may occur over time, but there was no evidence here that either victim did anything provocative in the six days that followed the message. The cases Vasquez relies upon are thus dissimilar. (See *People v. Wharton* (1991) 53 Cal.3d 522, 569; *People v. Berry* (1976) 18 Cal.3d 509, 515, superseded by statute on other grounds in *People v. Spurlin* (1984) 156 Cal.App.3d 119, 125; *People v. Borchers* (1958) 50 Cal.2d 321, 328; superseded by statute on other grounds in *Spurlin* at p. 125.)

Voluntary manslaughter requires adequate provocation to arouse a reasonable person to make a homicidal attack and the defendant must actually be under the influence of a strong passion arising from that provocation. (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1552.) The defendant must reasonably believe that the victim personally engaged in the provocative act. (*People v. Lee* (1999) 20 Cal.4th 47, 59-60.) No specific type of

---

defense theory. (*People v. Breverman* (1998) 19 Cal. 4th 142, 157.)

provocation is required. (*People v. Berry*, *supra*, 18 Cal.3d at p. 515.)

Vasquez argues that someone could have said something in the park to provoke him. He cites no such evidence, but quotes the trial court's description of the evidence when it decided to give the second-degree instruction. It said to counsel, "the main reason I think there is some potential evidence that he didn't premeditate and deliberate is the witness who said that there were words exchanged between the parties, that they had a talking, so if there words exchanged that leads to the possibility something was said in those words, they already had a very tense situation . . . ."

There is no evidence in the record that Juan or Antonio did or said anything at the park to provoke Vasquez. A witness said he "imagine[d] they were exchanging words," but testified that he could not actually hear or see a conversation. "'Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.'" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.)

Vasquez points to his statement that he said he did not want to "look like a bitch" or "get jumped," but this is not evidence of provocation sufficient to arouse a reasonable person to make a homicidal attack. Simple assault does not rise to the level of provocation necessary to support a voluntary manslaughter instruction. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

Because there was no error, we need not decide whether *Chapman*[3] applies to the failure to instruct sua sponte on voluntary manslaughter. (*People v. Breverman*, *supra*, 19 Cal.

---

[3] *Chapman v. California* (1967) 386 U.S. 18

4th at p. 187, (dissenting opn. of Kennard, J.); *People v. Thomas* (2013) 218 Cal.App.4th 630, 633; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1145.)

Firearm Enhancements

Vasquez was sentenced 17 days after a change in the law that gave the trial court discretion to strike or dismiss the firearm enhancements. (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 1, § 2 (S.B. 620).) It does not appear from the record that the court knew it had discretion to do so.

Vasquez was initially scheduled to be sentenced on November 8, 2017, before the change in the law became effective. The sentencing report was prepared before the change in law, and did not mention it. Likewise, the People's sentencing brief did not mention it. Defendant's sentencing brief also did not mention the change, but it did suggest a minimum sentence that could be imposed "if [the court] ran the two second degree 187 convictions concurrent, and struck all of the 12022.53 enhancements." It did not identify any authority to strike the enhancements.

The authority to strike the enhancements was also not mentioned by anyone at the sentencing hearing. The court inaccurately described subdivision (h) as requiring it to select "the gun allegation with the greatest punishment."

We generally presume the trial court was aware of and followed the applicable law. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114; Evid. Code, § 664.) We do not infer from a silent record that a trial court was unaware of its discretion. (*People v, Visciotti* (1992) 2 Cal.4th 1, 49.) But remand is appropriate where, as here, it does not appear the trial court knew it had discretion and it did not state how it would exercise its discretion

if it had it. (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974-1975.)

The People argue that remand is not appropriate because the record shows the trial court would not have exercised its discretion to lessen the sentence. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) The trial court imposed consecutive sentences and described the crime as "monstrous." It also said that Vasquez should not receive "any kind of youthful parole treatment." However, this was not a clear indication of how it would exercise its discretion to strike the enhancements. It could have ensured a very lengthy prison sentence while still striking an enhancement.

DISPOSITON

The trial court's imposition of firearm enhancements under section 12022.53, subdivision (d) is reversed and remanded and the trial court is directed to exercise its discretion under section 12022.53, subdivision (h) with respect to those enhancements. We express no opinion on the matter. In all other respects, the judgments of conviction are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Stephen A. Marcus, Judge

Superior Court County of Los Angeles

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.